No. 82-1066

In the Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Appellant,

vs.

HARRY PTASYNSKI, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA, NATIONAL ASSOCIATION OF ROYALTY OWNERS, GUS O. HOLLIS, MAXINE HOLLIS, AND JEAN WALSH QUINNETT, IN SUPPORT OF APPELLEES

WILKES C. ROBINSON, Counsel of Record
DAN M. PETERSON
GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA
1000 Brookfield Building
101 W. Eleventh
Kansas City, Missouri 64105
(816) 474-6600

E. L. MENSENDIEK, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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INTEREST OF AMICI CURIAE

Gulf & Great Plains Legal Foundation of America is a not-for-profit public interest legal foundation incorporated in Missouri in 1976. It principally serves the people of a nine-state region including Texas, Louisiana, Oklahoma, Arkansas, Kansas, Missouri, Nebraska, and North and South Dakota. The Foundation, among other goals, supports the principles of free enterprise, limited government, and individual liberties. The activities of the Foundation

include original litigation as well as the filing of amicus briefs, of which several have previously been submitted to this Court.

The National Association of Royalty Owners ("NARO") is a voluntary association of owners of royalty interests in oil and gas production. NARO is headquartered in Ada, Oklahoma. NARO's members include many residents of Texas, Oklahoma, and Louisiana, which are three of the states most strongly affected by the lack of geographic uniformity in the Crude Oil Windfall Profit Tax Act of 1980.

Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett are holders of small interests in oil and gas production which are subject to the Crude Oil Windfall Profit Tax Act of 1980.* All of these interests are taxed in the seventy percent bracket under the Act. Each of these individual amici has applied for a refund of amounts paid by them under the Act for 1980, the year for which refunds were requested by the taxpayer appellees in the case at bar.

NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett are all of the named plaintiffs in a suit now pending in the United States Court of Appeals for the Tenth Circuit. That suit (*Hollis v. United States*, No. 82-1780) is similar to the case at bar in that it is a suit by taxpayers to have the Crude Oil Windfall Profit Tax Act of 1980 declared unconstitutional. In order to protect their interests in that litigation, as well as to assert their interests as taxpayers affected by the challenged statute, NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh

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*Counsel are informed that on March 31, 1983, Gus O. Hollis died as the result of an accident. It is expected that his estate will be substituted as a plaintiff in *Hollis v. United States*, and we would respectfully request that this Court continue to consider his or his estate's interest as an amicus in this case.

Quinnett appear as amici in this case. Attorneys for Gulf & Great Plains Legal Foundation of America are the counsel for NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett in *Hollis v. United States*. In that suit, and in the case at bar, Gulf & Great Plains Legal Foundation of America is representing such persons without charge.**

Written consents to the filing of this amicus brief have been obtained from the Acting Solicitor General and all other parties to this appeal, and are being filed herewith.

**The Legal Foundation of America has previously filed a brief in this case on behalf of itself as amicus curiae, as well as on behalf of NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett as additional amici. In conjunction with the filing of the present brief, Gulf & Great Plains Legal Foundation of America is entering an appearance as substituted counsel on behalf of amici NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett. Counsel previously appearing for NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett has authorized the Gulf & Great Plains Legal Foundation of America to state that he consents to this substitution, and that the Legal Foundation of America continues to appear as an amicus in this case on its own behalf. NARO, Gus O. Hollis, Maxine Hollis, and Jean Walsh Quinnett adopt the positions taken in the Legal Foundation of America brief, but are now represented by Gulf & Great Plains Legal Foundation of America.

SUMMARY OF ARGUMENT

Amici contend that the Crude Oil Windfall Profit Tax Act of 1980 is unconstitutional under the Uniformity Clause of the United States Constitution, since on its face the Act exempts certain crude oil production from an excise tax based upon the geographic location of that production. The briefs of the Appellees and Appellee-Intervenors thoroughly address the history of the Uniformity Clause, the policies behind its adoption by the Constitutional Convention, and its interpretation by this Court. Amici concur in such arguments, and will not repeat them here. The requirement of the Uniformity Clause that any excise tax be "uniform throughout the United States" is explicit and direct, and this Court has consistently construed that Clause to require geographic uniformity. The policies or justifications alleged to support a geographically non-uniform enactment are irrelevant. An Act of Congress, to be constitutional, can no more contravene the specific command of the Uniformity Clause than it can any of the other direct and explicit limitations on congressional power contained in Article I.

The primary arguments advanced by amici concern the severability of the exemption of Alaskan oil from the remainder of the Crude Oil Windfall Profit Tax Act. The District Court held that the Alaskan exemption could not be severed, based upon its findings of congressional intent. But the District Court further found that invalidation of the Alaskan exemption would necessarily result in extension of the tax to all crude oil production in Alaska, which extension would amount to impermissible judicial legislation. In this brief, amici will develop that argument more thoroughly. The "judicial legislation" of a tax, which would result from severing the Alaskan exemption, is not

within the power of this or any Court, since the imposition of a tax by the judiciary would violate the principle of separation of powers, and constitute an assumption of an enumerated legislative power which has been reserved by the Constitution to Congress alone. This Court has repeatedly affirmed the principle that the judiciary cannot constitutionally exercise legislative powers, and, in a long line of cases, has held that the judiciary has no power to impose a tax.

In addition, the action requested of this Court by the Government in "severing" the Alaskan exemption would depart from the "case or controversy" presented by the Appellees' claims, and move the Court into an area in which it has no jurisdiction. The question of whether a tax should be imposed is a legislative decision, and is neither the type of dispute "historically viewed as capable of resolution through the judicial process" nor "a real and substantial controversy which unequivocally calls for the adjudication of the rights" asserted. Therefore, any inquiry into whether a tax should be imposed upon exempt Alaskan oil is foreclosed, since that question is not justiciable. The Court only has power to decide whether the Act meets constitutional standards. If it does not, any action of a legislative character to cure the infirmity must remain with Congress.

ARGUMENT

I. THE WINDFALL PROFIT TAX ACT, BY REASON OF ITS EXEMPTION OF OIL PRODUCED FROM CERTAIN GEOGRAPHIC REGIONS, VIOLATES THE UNIFORMITY CLAUSE.

The Constitution of the United States provides that:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States * * *. U.S. Const., art. I, §8, cl. 1.

The Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, imposes an excise tax which is not uniform throughout the United States, since oil produced in certain geographically defined regions of Alaska is exempt from the tax. 26 U.S.C. §4994(e) (1980).

The decisions of this Court construing the Uniformity Clause have without exception held that the uniformity required thereunder is geographic uniformity. *Fernandez v. Wiener*, 326 U.S. 340 (1945); *Riggs v. Del Drago*, 317 U.S. 95 (1942); *Charles C. Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589 (1931); *Poe v. Seaborn*, 282 U.S. 101 (1930); *Bromley v. McCaughn*, 280 U.S. 124 (1929); *Florida v. Mellon*, 273 U.S. 12 (1927); *La Belle Iron Works v. United States*, 256 U.S. 377 (1921); *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916); *Billings v. United States*, 232 U.S. 261 (1914); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Patton v. Brady*, 184 U.S. 608 (1902); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Knowlton v. Moore*, 178 U.S. 41 (1900); *Pollock v. Farmers' Loan &*

Trust Co., 157 U.S. 429 (1895); *Head Money Cases*, 112 U.S. 580 (1884); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796).

The Government argues that whether the tax is geographically uniform is not the test. According to the Government, "the question is whether the classification based on those geographic considerations is justified by the relationship of those considerations to the 'subject' of the regulation or tax." Brief for the United States at 27. The Government devotes over ten pages of its brief to showing that Congress had good grounds for exempting certain Alaskan production from the tax. Brief for the United States at 13-23. In other words, the Government seeks to change the inquiry from whether the tax is uniform to whether Congress was right in making it not uniform.

This they cannot do. There are certain commands and limitations in the Constitution which are so mandatory, clear, and direct in their application that they cannot be disregarded, no matter how good the grounds might seem for doing so in a particular case. Clause 12 of art. I, §8 is an analogous provision, since it also contains a grant of power with a limitation. Congress is given the power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years * * *." May Congress, or this Court, disregard such an express limitation upon a showing that it was expedient, convenient, or even profoundly wise to do so? May a "Tax or Duty * * * be laid on Articles exported from any State" upon a showing that reasonable justifications existed for such a tax? U.S. Const., art. I, §9, cl. 5. May a direct tax be laid, not in proportion to the census, because there might be compelling reasons for doing so? U.S. Const., art. I, §9, cl. 4. May an ex

post facto law be passed, or a title of nobility granted, because considerations of public policy appear to support it? U.S. Const., art. I, §8, cl. 8.

This Court has never permitted such inquiries. Certainly, issues of construction or interpretation of what is meant by the various terms of the Constitution are regularly presented to the Court. But there is no such question of construction here. The Court has made it abundantly clear, over the course of almost two centuries of interpreting the Uniformity Clause, that what is meant is geographic uniformity. Since the Crude Oil Windfall Profit Tax Act on its face treats some geographic areas of the country differently than other geographic areas, that Act is void on its face. As Justice Roberts explained, in a famous passage:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. *United States v. Butler*, 297 U.S. 1, 62 (1936).

To hold that the challenged Act does not violate the Uniformity Clause would make that Clause a dead letter. The fact that different circumstances might exist in portions of Alaska cannot be a justification, since differences in circumstance will always exist among the several states. If Congress may exempt Alaskan oil while taxing the rest of the country, it can just as certainly tax Wyoming coal while exempting West Virginia coal, or vice versa. "Justifications" could certainly be found to explain the imposition of a lower excise tax on gasoline in New York than in Texas. Costs in transportation alone would certainly

form a "rational basis" for a lower excise tax on tobacco and alcohol in Hawaii than in Kentucky. When the command of the Constitution is clear, neither Congress nor the courts are permitted to disregard it because policy considerations might support a different view. The issue has already been resolved by the people in 1788, and debate on the subject can only be reopened by the people through the amending process.

Though the Government hints that the exemption's non-inclusion of the entire state of Alaska may be of some importance (Brief of the United States at 20-21), it can in fact be of no consequence. If such a view were to be adopted, Congress could exempt from taxes oil produced south of the Mason-Dixon Line, wine produced west of the Continental Divide, or products sold on Manhattan Island. The fact that the exemption was cast in geographic terms of any description is what makes the statute defective.

II. IF THE WINDFALL PROFIT TAX ACT IS HELD UNCONSTITUTIONAL, THE EXEMPTION FOR ALASKAN OIL CANNOT BE "SEVERED," SINCE UNDER THE SEPARATION OF POWERS DOCTRINE COURTS HAVE NO POWER TO IMPOSE A TAX.

A. Under the doctrine of separation of powers, the judiciary has no power to "sever" a portion of an unconstitutional statute, if doing so would require the courts to exercise a legislative power expressly confided to the Congress.

The District Court found that the entire Act must fall because the exception for "exempt Alaskan oil" could not be severed. *Ptasynski v. United States,* 550 F.Supp.

549, 555 (D.Wyo. 1982). The lower Court relied principally upon the legislative intent in so ruling. *Id.* at 554-55. The Appellees and Appellee-Intervenors in their briefs have also furnished an extensive analysis of the legislative history, and the rules of construction to be applied thereto, which fully supports the District Court's conclusion.

However, the District Court found a further basis which required the entire Act to be invalidated; namely, the fact that "severance" of the Alaskan exemption would amount to judicial imposition of a tax. As the Court stated:

> Were the Alaskan exemption simply invalidated, and the balance of the Act left independently enforceable, the result would be extension of the tax to all crude oil production in Alaska, subject of course to the categorization of the various tiers. Action of that nature amounts to judicial legislation which is not permissible and should be avoided by courts. Under the "guise of interpretation" courts cannot alter legislative intent or usurp legislative authority, 73 Am. Jur.2d *Statutes*, §197, p. 394 (1974) and cases cited therein; Sutherland, *supra* at §44.13, p. 359, and this Court will not infringe upon the powers and duties of Congress. Accordingly, due to the unconstitutionality of the Alaska exemption, the Act in its entirety must fall. *Id.* at 555.

Imposition of a tax by a court is more than something that "should be avoided." The roots of any court's disability to impose a tax go deeper than that, extending down to the most fundamental principles upon which our Constitution and theory of government are based. The question of congressional intent is of limited value under the facts of this case. Whether Congress *would have* taxed the exempt Alaskan oil had it known for certain that such

exemption would violate the Uniformity Clause is not dispositive. The fact remains that under our system of government *only* Congress can do so. The most ironclad evidence of congressional intent to "sever" the exemption, and to tax Alaskan oil, would not justify this Court in doing so, since the *power* to do so is reserved exclusively to Congress. The power of taxation is quintessentially a legislative power, and cannot be exercised by the judiciary.

The most famous exposition of the doctrine of separation of powers is that of Montesquieu. In counseling that true liberty depends upon a separation of the legislative, judicial, and executive powers, Montesquieu specifically noted that a separation of legislative and judicial powers is essential:

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then legislator. Montesquieu, *The Spirit of the Laws*, Book 11, §6, at 152 (T. Nugent trans. 1949).

By the time of *The Federalist*, Montesquieu's principles of separation of powers had such a deep hold on political thought that Madison was able to refer to him as "the celebrated Montesquieu" and state that he is the "oracle who is always consulted and cited on this subject." *The Federalist* No. 47, at 330 (J. Madison) (M. Dunne ed. 1901). Madison quoted the above passage from Montesquieu, *id.* at 332, and agreed that:

> The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. *Id.* at 331.

This Court has had many occasions to stress the fundamental importance of the separation of powers:

> The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. III nor any other single provision of the Constitution, but because "behind the words of the constitutional provisions are postulates which limit and control." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 591 (1949) (quoting Hughes, C. J., in *Monaco v. Mississippi*, 292 U.S. 313, 323 (1934)).

The purpose of the separation of powers has been described as follows:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands. *O'Donoghue v. United States*, 289 U.S. 516 (1933).

Even small departures from this separation are problematic:

> One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule. *Sinking Fund Cases*, 99 U.S. 700, 718 (1879).

Equally basic, and allied to the doctrine of separation of powers, is the principle that the federal government is a government of enumerated powers. As Chief Justice Marshall said in an historic case:

> The government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it * * * is now universally admitted. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 405 (1819).

Though the enumerated powers have been greatly expanded in recent years, the principle remains a bedrock of our system. It cannot be denied that, as a general rule, powers which are specifically enumerated in the Constitution as belonging to one branch of government cannot be exercised by another branch, unless there has been an express delegation of that power under appropriate limitations and safeguards. As will be shown below, the power to impose a tax is one of the most basic of legislative functions, and has always been so considered by this Court. For a court to impose a tax on persons whom Congress has never taxed on that subject would violate the most essential principles of the separation of powers.

B. The power to lay a tax is a legislative power, which the Constitution entrusts solely to Congress, and the judiciary therefore cannot impose a tax in this case without violating the separation of powers.

The Constitution, in enumerating the "legislative Powers herein granted" specifically states that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises * * *." U.S. Const., art. I, §1; *id.* at §8, cl. 1. Furthermore, any legislation to raise revenue must originate in the House of Representatives. U.S. Const., art. I, §7, cl. 1.

This Court has recently declared that "[t]axation is a legislative function" and that Congress "is the sole organ for levying taxes * * *." *National Cable Television Ass'n,*

Inc. v. United States, 415 U.S. 336, 340 (1974) (citing art. I, §8, cl. 1). At issue in that case was the validity of certain assessments which might be made by the FCC on community antenna television systems. The Court held that certain elements of cost could not be considered in computing such assessments, lest the assessments imposed become a "tax" instead of a "fee." The Court condemned as a "sharp break with our traditions" any inference that "Congress had bestowed on a federal agency the taxing power." *Id.* at 341. If the Congressional grant of power to the FCC were construed in its broadest sense, the Court concluded that it would carry the agency "far from its customary orbit and [put] it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* The opinion quoted with approval the remarks of Mr. Chief Justice Hughes that "The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *Schechter Corp. v. United States*, 295 U.S. 495, 529 (1935).

If the executive branch, under an express grant of congressional authority, is not permitted to impose revenue raising measures because such measures by their breadth might turn into a tax, surely the judiciary is prohibited from imposing taxes when there has been no delegation from Congress at all. In a long line of cases, this Court has affirmed that very principle.

The leading case holding that the judiciary lacks the *power* to impose a tax is *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107 (1874). In that case, a judgment creditor of a city sought to have the federal judiciary order that a tax be imposed upon the municipality in order to pay certain municipal bonds. Actions in mandamus had failed to produce any result, since the appropriate municipal officers kept resigning from office to avoid levying

the tax. This Court, while recognizing the validity of the debt, stated that there was a "grave question of the *power* of the court to grant the relief asked for." *Id.* at 116. [emphasis added] The Court continued:

> We are of the opinion that *this court has not the power to direct a tax to be levied* for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised * * * by the power of legislative authority only. *It is a power that has not been extended to the judiciary.* Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important. *Id.* at 116-17. [emphasis added]

The Court did not say that it declined to substitute its judgment for the legislative authorities, or that the actions of the legislative authorities were wise or unwise, proper or improper, legal or illegal. The discussion is phrased entirely in terms of the Court's *power*, and the inability of a court to exercise the legislative power to tax. Imposition of a tax by a court is simply outside its arsenal of available remedies.

The *Rees* case has been repeatedly reaffirmed by this Court. For example, in *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942), Mr. Justice Frankfurter noted that the taxing power can only be carried out through "authorized officials." *Id.* at 511 (citing *Rees*). He stated that the only remedy for unsecured creditors of a city "is a mandamus to compel the levying of *authorized* taxes." *Id.* at 510. [emphasis added]

In *Yost v. Dallas County*, 236 U.S. 50 (1915), Mr. Justice Holmes also cited *Rees* with approval. In that case, a frustrated creditor of a local government had been un-

successful in mandamus actions. Justice Holmes opined that by bringing suit in the United States Court the plaintiffs "acquired no greater rights than were given to him by the local statutes." *Id.* at 56. Noting that the tax depended on the sovereignty of the state, Justice Holmes reaffirmed that the taxes could only be levied in the manner provided by the *statute,* and that the courts could not fashion any additional relief. *Id.* at 56-57. The fact that the tax would fall "upon people who are not parties to * * * the suit" was said to be "an additional consideration in favor of the result * * *." *Id.* at 57.

In *Heine v. Levee Commissioners,* 86 U.S. (19 Wall.) 655 (1874), similar principles were applied. Again, the Court was asked to assess taxes when a local board had failed to do so. The Court declined to do so on grounds that it lacked the *power* to impose a tax:

> The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the Levee Commissioners. If that body has ceased to exist, the remedy is in the Legislature either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal Court. It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state

> government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee. *Id.* at 660-61.

The Court expressly relied upon the *Rees* case in reaching this result. *Id.* at 661. *See also South Dakota v. North Carolina*, 192 U.S. 286 (1904) ("A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the Legislature"; citing *Rees* and other cases); *Thompson v. Allen County*, 115 U.S. 550 (1885) (summarizing cases); *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880) ("The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.").

The nature of the Supreme Court's judicial review of statutes for constitutionality, and the relation of that power to the separation of powers, was well explained in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). This Court there stated that:

> The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other, and neither may control, direct, or restrain the actions of the other. * * * We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. * * * [The Court's power] amounts to little more than the *negative power to disregard an unconstitutional enactment* * * *. *Id.* at 488. [emphasis added]

That this Court has the power, and indeed the duty, to disregard the Windfall Profit Tax Act if it violates the Uniformity Clause cannot be doubted. But, as *Massachusetts v. Mellon* makes clear, there is no warrant for going beyond that duty to exercise a legislative power in order to save the statute.

An analogous case was presented in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). There a statute was held unconstitutional on its face, and the Government urged that it should nevertheless be held constitutional as applied to the particular appellants. *Id.* at 515. The Court stated:

> It must be remembered that '[a]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute * * *' or judicially rewriting it. * * * To put the matter another way, this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction rendering it free from constitutional defects.

See also United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971) ("It is for Congress, not this Court, to rewrite the statute * * *."); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 390 (1959) (refashioning statute "more consonant with the task of a Congressional committee than with judicial construction"); *Stanard v. Olesen*, 74 S.Ct. 768, 771 (1954) ("[I]t is for Congress, not the courts, to write the law."); *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939) (Court cannot "rewrite the statute.").

Clearly, the Windfall Profit Tax Act will not bear a construction which would make it constitutional, since the

geographic limitations contained therein make it void on its face. When this Court will not, as a matter of general policy, "rewrite" statutes to make them constitutional, any ability to do so must be totally lacking when such an action would result in the imposition of a tax, and the Constitution confides that power exclusively to Congress.

The case against judicial exercise of a legislative power is especially strong when Congress has clearly and deliberately omitted the provision which the Court is invited to supply. As stated in *Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 97 (1981):

> In almost any statutory scheme, there may be a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.

See also United States v. Cooper Corp., 312 U.S. 600, 605 (1941) ("[I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made."); *Ebert v. Postman*, 266 U.S. 547, 554 (1925) ("A casus omissus does not justify judicial legislation."); *Federal Trade Commission v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 67 (1959) ("We cannot supply what Congress has studiously omitted."); *Iselin v. United States*, 270 U.S. 245, 251 (1926) ("To supply omissions transcends the judicial function."); *Southern S. S. Co. v. National Labor Relations Board*, 316 U.S. 31, 44 (1942) ("When the legislative purpose is so plain, we cannot assume to do that which Congress has refused to do.").

This Court has refused to sever portions of a tax statute when to do so would involve the exercise of a legislative function. In *Marchetti v. United States*, 390 U.S. 39 (1968), the Court refused to impose restrictions upon a tax statute

which, according to the Government, would have saved it from a finding of unconstitutionality. It emphasized the fact that the Constitution has placed such legislative powers in the Congress, and that those powers cannot be exercised by the Court. *Id.* at 60. The opinion also concluded that the offending section could not be severed because the result would be to rewrite the statute. The Court stated that "this would, to some extent, substitute the judicial for the legislative department of government * * *. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty." *Id.* n. 18. *See also Haynes v. United States,* 390 U.S. 85, 99-100 (1968); *Oklahoma Tax Commission v. Texas Co.,* 336 U.S. 342, 365-66 (1949) (question of whether immunity from taxes shall be extended is essentially legislative in character).

The Court has expressly found itself to be without "authority" or "competence" to extend a tax beyond that which was passed by the legislature, even when the failure to do so would result in unconstitutionality. *Davis v. Wallace,* 257 U.S. 478 (1922). In that case this Court said:

> Here the excepting provision was in the statute when it was enacted, and there can be no doubt that the Legislature intended that the meaning of the other provisions should be taken as restricted accordingly. Only with that restricted meaning did they receive the legislative sanction which was essential to make them part of the statute law of the state, and no other authority is competent to give them a larger application * * *. [T]o sustain the tax in question we should have to hold that the taxing officers, on finding that it could not constitutionally be assessed on the basis specially prescribed in the statute, were at liberty to assess it on another and different basis * * *. Of course, we cannot so hold. *Id.* at 484-85.

C. This Court does not have jurisdiction to impose a tax on exempt Alaskan oil not passed by Congress, since a decision to impose a tax is not a "case or controversy" within the constitutional meaning of those terms.

It is elementary that a question is not justiciable by this Court if it does not present a "case or controversy" within the meaning of U.S. Const., art. III. This Court has recently stated that:

> The purpose of the case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The clash of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult * * * questions." [citations omitted] *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 382-83 (1980).

Under the peculiar facts of this case, the existence of a "case or controversy" is inextricably linked with the question of whether a legislative function is being performed. There can be no doubt that a justiciable controversy is presented with respect to whether the Windfall Profit Tax Act violates the Uniformity Clause, since all that is involved in such a determination is the familiar question of measuring an Act of Congress against recognized constitutional standards. However, to "sever" the Alaskan oil exemption, as the Government requests, would necessarily involve imposition of a tax which Congress has not legislated. Any such action would radically depart from those types of questions "historically viewed as capable of resolution through the judicial process." No legal issues are presented in making such a determination; it is a pure policy decision.

The issue of whether a tax should be imposed does not "present a real and substantial controversy which unequivocally calls for adjudication of the rights" asserted. *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (Brennan, J., concurring). Similarly, "the appropriateness of the issues" for judicial decision has been held to be an important factor in determining justiciability, and the imposition of a tax fails that test as well. *Id.* at 509 (Frankfurter, J., plurality opinion). It is difficult to imagine an issue which is less appropriate for judicial decision than the issue as to whether a tax should be imposed. As this Court has repeatedly stated, the area of tax policy is an "area of limitless factual variations," and it is therefore the province of Congress, and not the courts, to devise appropriate rules. *Bingler v. Johnson*, 394 U.S. 741, 751 (1969); *United States v. Correll*, 389 U.S. 299, 307 (1967).

The inappropriateness of a judicial forum for passing upon questions of tax policy was strikingly described in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). In that case, this Court considered the validity of a Montana severance tax on coal. Particularly, the tax was claimed to violate various constitutional and federal statutory provisions because of the high rate of tax imposed. The Court declined to embark upon any analysis which would make the rate of taxation a matter of federal constitutional law. After noting that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution, the Court underlined the impossibility of determining questions of tax policy in a judicial forum:

> In the first place, it is doubtful whether any legal test could adequately reflect the numerous and competing economic, geographic, demographic, social, and political considerations that must inform a decision about an acceptable rate or level of state taxa-

> tion, and yet be reasonably capable of application in a wide variety of individual cases. But even apart from the difficulty of the judicial undertaking, the nature of the factfinding and judgment that would be required of the courts merely reinforces the conclusion that questions about the appropriate level of state taxes must be resolved through the political process. *Id.* at 628.

Of course, the decision to impose a tax *a fortiori* involves these considerations to an even greater extent than a decision as to the appropriate rate level. Certainly a tax which will likely involve billions of dollars worth of revenue cannot be imposed as a mere incident of a general severability clause, or as the result of canons of statutory construction. Some department of the government must pass upon the prudence and wisdom of such a tax. Congress has indeed passed upon the wisdom of such a tax on Alaskan oil, and has decided that such a tax should not be imposed. To impose such a tax by "severing" the exemption of Alaskan oil would require this Court either to impose the tax without considering its merits, or to impose it after a reasoned consideration of its merits. Neither is desirable nor permissible, because neither is an exercise of the judicial function of deciding "cases or controversies."

The legislative history of the Windfall Profit Tax Act has been extensively discussed in the briefs filed by the parties in this case. In light of that legislative history, the remarks of this Court in *American Automobile Association v. United States,* 367 U.S. 687 (1961), are entirely appropriate:

> At the very least, this background indicates Congressional recognition of the complications inherent in the problem and its seriousness to the general

> revenue. We must leave to the Congress the fashioning of a rule which, in any event, must have wide ramifications. The Committees of the Congress have standing committees expertly grounded in tax problems, with jurisdiction covering the whole field of taxation and facilities for studying considerations of policy as between the various taxpayers and the necessities of the general revenues. The validity of the long-established policy of the Court in deferring, where possible, to Congressional procedures in the tax field is clearly indicated in this case. *Id.* at 697.

The above comments were made in the context of refusing to interfere with established tax rules. Those considerations are doubly compelling when the proposed action by this Court would be to impose a tax on individuals which Congress has never enacted as to them. As stated in *Marchetti v. United States*, 390 U.S. 39, 59 (1968):

> We cannot know how Congress would assess the competing demands of the federal treasury and of state gambling prohibitions; we are, however, entirely certain that the Constitution has entrusted to Congress, and not to this Court, the task of striking an appropriate balance among such values. *Id.* at 59-60.

In a similar vein, there is no way for this Court to know how Congress would assess "the competing demands" of the federal treasury and of crude oil production.

Because it is essentially legislative in character, and involves the balancing of numerous complex policy and political issues for which the courts are not an appropriate forum, the invitation by the Government to impose a tax by "severing" the Alaskan oil exemption does not present a justiciable "case or controversy" within the meaning of Article III.

CONCLUSION

Title I of the Windfall Profit Tax Act clearly violates the Uniformity Clause by granting an exemption from an excise tax which is expressly based upon geographic boundaries. The entire Act must be declared unconstitutional. Any attempt to "sever" the exemption for Alaskan oil would necessarily result in the imposition of a tax on such oil. The power to lay and collect taxes is exclusively confided to the Congress under Article I, §8, cl. 8. For this Court to impose such a tax, which has not been passed by Congress or signed by the President, would violate the separation of powers. Furthermore, since the imposition of a tax is essentially legislative in character, the request by the Government for this Court to impose such a tax does not present a case or controversy within the meaning of Article III. For the foregoing reasons, the judgment of the District Court should be in all respects affirmed.

Respectfully submitted,

WILKES C. ROBINSON, Counsel of Record
DAN M. PETERSON
GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA
1000 Brookfield Building
101 W. Eleventh
Kansas City, Missouri 64105
(816) 474-6600

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